No. 80-1707

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVERAGE FUNDING SYSTEMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the charges against them should be dismissed because fewer than 12 of the grand jurors who voted to indict attended all grand jury sessions.

Petitioners were indicted in the United States District Court for the Central District of California on 29 counts of mail fraud and fraud in the offer and sale of securities, in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a), 77x. At their request, the district court required the government to disclose grand jury voting and attendance records (Pet. App. A-2 to A-3). Those records revealed that of the 19 grand jurors who unanimously voted to indict, nine were present at all 13 grand jury sessions, five were present at 12 sessions, and five others were present at between 6 and 11 sessions (Pet. App. A-3).

Petitioners moved to dismiss the indictment, contending that at least 12 of the grand jurors who vote to return an indictment must attend all sessions at which evidence is presented. The district court granted the motion and dismissed the indictment without prejudice (Pet. App. B-1 to B-21; 478 F. Supp. 799). The court of appeals reversed, one judge dissenting (Pet. App. A-1 to A-15; 637 F. 2d 645).

1. Petitioners contend (Pet. 16-26) that the court of appeals erred in reinstating the indictment.[1] The court's ruling, however, is not a conviction. It places petitioners in precisely the same position they would have occupied if the district court had not dismissed the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present these contentions, together with any others they may have, to this Court in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977).[2]

2. On the merits, the decision of the court of appeals is correct; moreover, it does not conflict with any decision of this Court or any decision of any other court of appeals. Notwithstanding the parade of undesirable consequences

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[1]Petitioners also contend (Pet. 27-31) that the government must present exculpatory evidence to the grand jury. But petitioners did not squarely present this claim to the district court and cite nothing in the record to suggest that the government did not follow its policy of presenting exculpatory evidence, even though not required to do so. See *United States* v. *Y. Hata & Co.*, 535 F. 2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976).

[2]We note that the order of the district court dismissing the indictment was entered on October 17, 1979. Trial of this case has been delayed for more than a year and a half as a result. This Court should not further prolong this delay by undertaking interlocutory review.

the petitioners assert may follow from the court of appeals' holding, the facts in *this* case do not justify their concerns. Fourteen of the grand jurors who voted to indict were present at all, or all but one, of the grand jury's 13 sessions. There is no evidence that the government withheld exculpatory evidence from the grand jury or presented such evidence at a time or in a way calculated to influence the smallest possible number of grand jurors. Under these circumstances, at least, further review by this Court is not warranted.

It is undisputed in this case that a quorum of the grand jury was present at every grand jury session and that a majority of the grand jurors voted in favor of petitioners' indictment, as is required by Rule 6(a) and 6(f) of the Federal Rules of Criminal Procedure. Petitioners' only complaint is that there were not 12 grand jurors who voted for their indictment who had perfect attendance records for the various grand jury sessions at whish evidence regarding petitioners was introduced. Nothing in the Rules of Criminal Procedure or any statute requires such a "perfect attendance" rule, and, as the court of appeals correctly held, the Constitution does not require any such rule either.

The Fifth Amendment provides, in pertinent part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *." While this guarantee ensures at least the individual petitioners the right to be indicted by a grand jury,[3] it does not specify any of the procedures that the grand jury must follow in determining whether to return an indictment. Traditionally, the grand jury has operated as a

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[3]The Ninth Circuit has held that corporate defendants, such as petitioners Leverage Funding Systems, Inc., and Centaur Films, are not entitled to the protection of the Grand Jury Clause of the Fifth Amendment. See *United States* v. *Armored Transport, Inc.*, 629 F. 2d 1313 (9th Cir. 1980), cert. denied, No. 80-948 (Mar. 2, 1981).

relatively independent institution, charged with the responsibility of determining whether there is probable cause to believe that a particular suspect has committed a crime. See generally *United States* v. *Calandra*, 414 U.S. 338, 343-344 (1974). Moreover, while the Fifth Amendment requires that a prosecution for an "infamous crime" must be initiated by a grand jury, the grand jury itself is a creature of statute at least with respect to the provisions for its governance. See *In re Mills*, 135 U.S. 263, 267 (1890); *United States* v. *Lang*, Nos. 78-1557 *et seq.* (7th Cir. Apr. 2, 1981), slip op. 5. Thus, the principles governing the conduct of petit juries and the presentation of evidence at trial have not been—and should not be—imposed on the grand jury, as petitioners suggest. See *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Calandra*, *supra*. In particular, because the grand jury's task is merely to determine, on the prosecutor's presentation, whether there is a prima facie case against a particular defendant, a grand juror need not have heard all of the evidence against a defendant in order to determine that probable cause has been shown. And, because grand jury investigations are frequently lengthy and cover many sessions, it would be impractical to require that the grand jurors be present at every session in order to be entitled to vote on an indictment.

Rule 6 of the Federal Rules of Criminal Procedure plainly contemplates that grand jurors need not be present for every session in an ongoing investigation in order to be entitled to participate. Rule 6(a) requires a quorum of only 16 jurors for every session—thus contemplating that as many as seven jurors may be absent from each grand jury session without impairing the validity of the proceedings. Under petitioners' argument, the quorum rule would be effectively undercut, since any grand jurors who were absent from a single session would no longer be entitled to cast a valid vote on any matter brought up at that session.

The quorum rule, however, was intended to serve the purpose of providing flexibility for the grand jury's operation, so that the grand jury could remain fully effective so long as 16 grand jurors were present at each session. Petitioners' proposed rule would add a significant qualification to the quorum rule: it would permit the grand jury to operate with as few as 16 members present, but only if at least 12 of those 16 had never been absent before. Rule 6(a) contains no such qualification, and in light of the purposes of the grand jury, there is no reason to impose such a qualification as a matter of constitutional construction.

Rule 6(g) provides even clearer support for the result reached by the court of appeals. That rule governs the discharge and replacement of grand jurors during the pendency of the grand jury's term. Recognizing the lengthy period that grand juries typically serve,[4] the Rule permits the court to replace grand jurors "for cause shown," when the need arises. The Rule clearly contemplates that the replacement process will enable the new jurors to serve in the place of—and with the same prerogatives as—the departed jurors. Yet under petitioners' proposed "perfect attendance" rule, replacement jurors would be rendered nearly useless with respect to any ongoing investigation. Because the votes of the replacement jurors would not be counted among the 12 needed to authorize an indictment, they would be "replacements" only in the sense that they could help to form a 16-member quorum at any given grand jury session; as a practical matter, their role in the grand jury's deliberations would be minimal. And if, in the course of a lengthy investigation, the court had to replace enough

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[4]An "ordinary" grand jury may serve up to 18 months. See Fed. R. Crim. P. 6(g). A "special" grand jury may serve up to 36 months, much of which time may be spent on a single investigation. See 18 U.S.C. 3331.

jurors that fewer than 12 of the original jurors remained,[5] the grand jury would lose its power to indict altogether, and it would presumably have to be discharged. Rule 6(g) contemplates that the court will have the power to keep the grand jury in effect throughout its term; petitioners' proposed rule would undercut the effect of Rule 6(g).

Although petitioners argue that the federal courts are in conflict regarding the result reached here, there is in fact no such disagreement. The only two decisions to support the result urged by petitioner are the district court's decision in this very case—which, of course, was reversed by the court of appeals—and a similar ruling by the same district court (but a different judge) in another case. *United States* v. *Roberts*, 481 F. Supp. 1385 (C.D. Cal. 1980).[6] Both district court decisions have thus been disapproved and are of no continuing precedential value. More significantly, the only other courts of appeals that have addressed the issue presented here have agreed with the result reached by the Ninth Circuit. See *United States* v. *Lang, supra; United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (2d Cir.), cert. denied, 323 U.S. 790 (1944). See also *United States* v. *Colasurdo*, 453 F. 2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); *Lustiger* v. *United States*, 386 F. 2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *United States* v. *Pastor*, 419 F. Supp. 1318 (S.D.N.Y. 1975), aff'd, 557 F. 2d 930 (2d Cir. 1977).

Finally, petitioners argue that their proposed "perfect attendance" rule is constitutionally required because the prosecutor has a duty to present exculpatory evidence to a grand jury and because any juror who is not in attendance

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[5]If the grand jury began with only 16 members, this would occur at the time the fifth replacement juror was named.

[6]Another case in the same district reached the result adopted by the court of appeals here. *United States* v. *Godoy*, No. CR 79-660 (A) (C.D. Cal. Nov. 6, 1979).

when such evidence is presented should not be permitted to make a judgment as to whether there is probable cause to believe the defendant has committed a crime. While the rule appears to be that a prosecutor has no such constitutional obligation,[7] this argument fails for a more fundamental reason. It overlooks the fact that a grand jury does not sit "to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial." *Bracy* v. *United States,* 435 U.S. 1301, 1302 (1978) (Rehnquist, J., in chambers). Because of this limited function, and because the grand jury is an ex parte proceeding, exculpatory evidence will seldom be presented to the grand jury. Yet this does not invalidate the grand jury's indictment. The protection against unfair conviction is provided primarily by the adversary proceeding before the petit jury. As this Court stated in *Costello* v. *United States, supra,* 350 U.S. at 363 (footnote omitted):

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.

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[7]See *United States* v. *Y. Hata & Co., supra; Loraine* v. *United States,* 396 F. 2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968); *United States* v. *Ruyle,* 524 F. 2d 1133, 1136 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *United States* v. *Smith,* 552 F. 2d 257 (8th Cir. 1977); *United States* v. *Brown,* 574 F. 2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978). The Department of Justice, however, has adopted internal regulations requiring that federal prosecutors present exculpatory evidence to the grand jury if that evidence "directly negates the guilt of a subject of the investigation." *United States Attorney's Manual* 9-11.334.

Thus, even if one or more of the grand jurors has been absent from a session at which some evidence favorable to the defendant has been presented, that should not be sufficient to disqualify the grand juror and disable the grand jury from discharging its obligation of determining if there is probable cause to believe the defendant has committed a crime.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[8]It is worth noting that because at least 16 grand jurors must be present at any session, at least 16 will be exposed to any exculpatory evidence presented at any session. Absent an extraordinary number of replacements of grand jurors, that provides a substantial assurance that the bulk of the jurors voting on the indictment will have heard the exculpatory evidence. Because the grand jury is a collegial body that can be expected to discuss among its members any cases regarded as close, the essence of any exculpatory evidence is likely to be communicated even to those members who may have been absent when the exculpatory evidence was presented.